

CHAPTER 5

PROCUREMENT PROCEDURES

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CHAPTER 5

PROCUREMENT PROCEDURES

5.1 Introduction

This chapter summarizes the laws, rules, and regulations that apply to procurement of contracted services, goods and materials that are purchased, and equipment that is leased for use on TxCDBG projects.

Procurement is the process through which an entity obtains goods and services from vendors. The federal government has established a set of procurement rules that apply to CDBG-funded projects. In addition, the State of Texas has enacted a set of regulations that also apply to CDBG contracts. The procurement procedures set forth in this chapter comply with both sets of regulations. In addition to applicable federal and state regulations, many local governments have laws and regulations regarding procurement. Grant Recipients must comply with all local laws governing procurement policies. In the event of conflict between federal, state and local law, the most stringent regulation applies.

A good procurement system should facilitate the Grant Recipient's ability to:

- Identify and specify standards for the goods or services the Grant Recipient wants to obtain - invitations for bids or requests for proposals must be clearly written and must describe the technical requirements of the equipment or services.
- Obtain an independent cost estimate for the goods or services.
- Seek competitive offers to obtain the best possible quality at the best possible price.
- Promote the maximum use of small, minority-owned and female-owned businesses and Section 3 businesses using other suggestions found in **Chapter 10: Civil Rights Requirements** of this manual
- Have a quality assurance system that helps ensure a fair price for the goods and/or services received in accordance with the standards set forth in the contract.
- Review all procurements to avoid unnecessary and duplicative purchases and to ensure costs are "reasonable".
- Use a written agreement that clearly states the responsibilities of each party; the method of contracting (fixed price, cost plus fixed fee, purchase orders, etc.) should be appropriate. **"Cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting will not be allowed under the CDBG program. The revised federal guidelines now require negotiations of profit as a separate element of the price for each contract where there is no price competition and for each contract and modifications greater than \$50,000. (See 2 CFR 200.323)**

Grant Recipients must provide adequate documentation to show that the selection process was carried out in an open, fair, uniform and thorough manner and to ensure that federal and state procurement requirements were met. Failure to maintain proper documentation may result in disallowed costs. These records must include, but are not limited to, the following information:

- Rationale for the method of procurement;
- Solicitation/response;
- Evaluation and selection criteria;
- Contractor selection or rejection; and
- The basis for the cost or price. The Grant Recipient should clearly identify during the procurement process any items included in the bid / purchase that are not included in the TxCDBG contract.

Regardless of the type of procurement used, the Grant Recipient must execute a contract to document the work to be completed, the agreed price, and contractor or provider's required compliance with all applicable state and federal requirements that Grant Recipient must follow.

TDA recommends that the Grant Recipient's attorney review bid packets and contracts before execution in order to ensure that all federal and state CDBG requirements, local laws and requirements specific to that municipality or county are incorporated. Certification for construction contracts is included in the sample construction contract as **Appendix K**.

5.1.1 Methods of Procurement

The Grant Recipient must use one of the following methods of procurement:

1. **Competitive Proposals (Professional Services)** – For purchases greater than \$50,000 where conditions for sealed bid are not appropriate. Preferred method for Professional Services such as architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.
2. **Micro-purchases less than \$2,000**– the purchase of supplies or services that are less than or equal to \$2,000. For such purchases, Grant Recipients may use simplified acquisition procedures instead of Small Purchase procedures as described below. Grant recipient must, to the extent practicable, distribute these purchases equitably among qualified suppliers.
3. **Small Purchase** – the acquisition of supplies or services between \$2,000 and \$50,000. Small purchase procedures are relatively simple and informal procurement methods for securing services, supplies or other property. Price or rate quotations must be requested from at least three (3) qualified sources.
4. **Sealed Bids (Formal Advertising)** – For purchases greater than \$50,000. Preferred method for construction contracts. Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.
5. **Noncompetitive Proposals** - special circumstances which are applicable for all purchase levels.

Source: 2 CFR 200.320. For Simplified Acquisition Threshold see 48 CFR Subpart 2.1

The Grant Recipient must obtain approval from TDA prior to using any method of procurement not described in this chapter.

5.1.2 Conflict of Interest

Grant Recipients of a TxCDBG contract must avoid, neutralize or mitigate actual or potential conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair the performance of the TxCDBG contract or impact the integrity of the procurement process.

To prevent conflicts of interest, the Grant Recipient must maintain written standards of conduct covering conflict of interest and governing the actions of its employees engaged in the selection, award, and administration of contracts. Any person or entity, including any benefitting business, utility provider, or other third party entity that is receiving assistance, directly or indirectly, under a TxCDBG

contract or award, or that is required to complete some or all work under a TxCDBG contract in order to meet a National Program Objective, or that might potentially receive benefits from TxCDBG awards, may not participate in the selection, award, or administration of a contract supported by CDBG funding. The Grant Recipient may choose to broaden local conflict of interest policies to additional family members and relatives.

A conflict of interest would arise when an employee, officer, agent, consultant, elected or appointed official, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has an interest or financial interest in or a tangible personal benefit from an entity or individual considered for a contract.

In addition, contractors that develop or draft specifications, requirements, statements of work or invitations for bids or requests for proposals must be excluded from competing for such procurements. (See 2 CFR 200.319). For example, an administrative consulting firm that participates in developing or distributing the request for proposals (RFP) may not then submit a proposal in response to that RFP.

Nepotism and conflict of interest regulations can be found in the Texas Government Code Chapter 573, Texas Local Government Code Chapter 171, 24 CFR 570.489(h), and 2 CFR 200.318(c).

Exception to Conflicts of Interest: TDA may grant an exception, upon written request from the Grant Recipient, to the conflict of interest provisions on a case-by-case basis if TDA determines that such exception will serve to further the purpose of the TxCDBG project and the effective and efficient administration of the project. (See TxCDBG Application Guide for necessary documentation)

5.2 Competitive Proposals (Professional Services Contracts)

The Competitive Proposal procurement method applies to all professional services contracts paid in whole or in part with TxCDBG funds.

Competitive Proposal procurement is used when factors other than cost are an important part of selecting the vendor and is the preferred method of selection of professional services such as engineering or architectural services. *Once proposals are received and rated/ranked, the Grant Recipient is free to negotiate with one or more respondents to arrive at the most advantageous terms and price.* This negotiation is the main difference between this method and the Competitive Sealed Bids Method.

The professional services generally used for CDBG projects means services within the scope of the practice, as defined in Section 2254.002(2) of the Texas Government Code:

- Accounting;
- Architecture;
- Landscape Architecture;
- Land surveying;
- Professional engineering; or
- Real estate appraising;

Provided in connection with the professional employment or practice of a person who is licensed or registered as:

- A certified public accountant;
- An architect;

- A landscape architect;
- A land surveyor;
- A professional engineer; or
- A state certified or state licensed real estate appraiser.

The Grant Recipient may not select a provider of professional services or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award: (1) on the basis of demonstrated competence and qualifications to perform the services; and (2) for a fair reasonable price.

All professional services and administration services related to TxCDBG projects must be procured competitively, regardless of the source of funds that will pay for the professional services contracts. Grant Recipients must adhere to the State of Texas' Professional Services Procurement Act (Texas Government Code, Chapter 2254).

- Professional services and administration services paid in whole or in part with TxCDBG funds must use the Step-by-Step procurement procedures described below.
- Professional services and administration services paid solely with local or matching funds must use the TxCDBG process or a competitive procurement process found in local policies.
- Such procurement procedures must be performed prior to the performance of any work by the service contractor. If professional service/administration service procurement procedures are not performed correctly, fees for professional services/administration services will not be eligible for reimbursement with grant funds or count towards community match funds.
- If pre-qualified lists of persons, firms or products are used for acquiring goods and services, the Grant Recipient needs to keep the list current and include enough qualified sources as to ensure open competition. (2 CFR 200.319(d))

The procurement requirements described in this Chapter will not apply to:

- Professional services and administration services performed by an employee of the Grant Recipient; and
- Similar services provided through an interlocal agreement with an agency of the state, such as an agreement with a Council of Governments. (Chapter 791.001 Texas Government Code)

Engineering Services

Generally, all public works projects must be designed, supervised, inspected, and accepted by a registered professional engineer, per the Texas Engineering Practice Act (See Texas Occupations Code, Title 6, Chapter 1001). Compliance with this Act is also necessary for projects involving the use of force account labor (i.e., city/county work crews). The exceptions to this Act include:

- Projects involving county routine road betterment (i.e., repaving, reconstruction, widening, curb and gutter); and
- Projects involving water or wastewater line replacement where there is no change in capacity, route, or grade.

Testing Services

- Testing as a component of construction should be reimbursed from the appropriate construction line item.
- Testing Services which require professional services must comply with the State of Texas' Professional Services Procurement Act (Texas Government Code, Chapter 2254) and should be reimbursed from the appropriate engineering line item.

5.2.1 Step-by-Step Selection Procedures for Competitive Proposal

STEP 1 Establish local Selection Review Committee

The Selection Review Committee establishes the criteria or evaluation factors to be used for selection and rating of competing respondents. This committee may consist of the entire local governing body, a subset of this body, or one of the aforementioned with designated staff support.

The selection committee members shall have no potential conflicts of interest with any of the individuals, firms, or agencies under review (e.g., family relationships, close friendships, business dealings) and no person who might potentially receive benefits from CDBG-assisted activities may participate in the selection, award, or administration of a contract supported by CDBG funding if he or she has a real or apparent conflict of interest.

STEP 2 Determine the Scope of Services

The scope of work for a professional services or administration services contract describes all desired tasks that a Grant Recipient expects a professional services or administration services provider to perform under a contract. The scope of work should itemize tasks needed, with timeframes and achievable goals as appropriate and is the basis for the Request for Proposals (RFP) and services contract. Sample scopes of work for both administrative management consultants and engineers can be found in the sample contract in **Appendix I**.

STEP 3 Establish Written Selection Criteria

The committee's written selection criteria should include, at a minimum, a clear and accurate description of the technical requirements of the services to be procured. Such descriptions shall not contain features that unduly restrict competition. TDA strongly recommends that the Grant Recipient use a scoring method for reviewing professional services /administration proposals.

The specific criteria to be used by the Grant Recipient should fit the needs of the desired services and the specifics of the proposed project. The importance of each of these factors should be determined before the review process begins by assigning weighted values to each factor. The local governing body has final authority to approve all professional services and administration services contracts and should be closely involved in the establishment of the written selection criteria. Sample rating sheets for administrators/management and architects/engineers are included as **Form A501** and **Form A502**, respectively.

A consultant that intends to respond to the Request for Proposals may provide information on TxCDBG procurement procedures, but may NOT participate in the development or drafting of specifications, requirements, statements of work, or invitations for bids or requests for proposals, including, but not limited to, the development of the scoring criteria, the final selection of firms to be contacted, or the scoring of proposals.

STEP 4 Develop the Request for Proposals (RFP) Package

The Grant Recipient must develop a RFP package to issue to potential respondents. The RFP package must contain three parts. Samples of each required document are found in Appendix I.

- **Cover Letter**: The purpose of this letter is to solicit proposals from interested parties. This can be tailored to the Grant Recipient's specific project.
- **Request for Proposals (RFP)**: The RFP provides detailed instructions to respondents and the criteria to be used in evaluating proposals. The RFP should include the following components:
 - A statement of qualifications;
 - Proposed cost of services/fee structure (non-engineering/architectural/surveyor services only);
 - Experience with federal programs;
 - Capacity to perform the specific proposed task;

- Affirmative action efforts; and
 - References – a list of past/current clients so that the proposals can be ranked based on past performance. The selection committee should contact these references and evaluate the respondent's experience, work performance, and capacity to perform.
- **Sample Contract:** A sample professional services/administration services contract containing the terms and conditions of the contract between the Grant Recipient and the service provider should be provided as part of the RFP package. This contract should contain four parts:
 - Part I - Agreement
 - Part II - Scope of Work
 - Part III - Payment Schedule
 - Part IV - Terms and Conditions

STEP 5 Advertise and Distribute the RFP and Evaluation Factors

In order to create competition for the work, the Grant Recipient must advertise the RFP and all evaluation criteria and their relative importance. A sample advertisement is provided that can be altered for the appropriate service. (See Appendix I) The Grant Recipient must:

- Contact a minimum of five individuals/firms for their response by email, fax, or return receipt mail. The reason for selecting the individuals/firms must be documented in the local files.
- Advertise in a locally distributed newspaper. (If no local newspaper is published in the municipality or county, the advertisement may be posted at the city hall or county courthouse.) The deadline for receipt of proposals must be at least ten days after the date of public advertisement and contact dates of the RFP.

STEP 6 Promote participation of MBEs and Section 3 Businesses

Grant Recipients should actively take steps to encourage proposals from small (SBE's), minority (MBE's), and woman-owned businesses (WBEs), as well as Section 3 business concerns. Although Grant Recipients are not directly responsible for meeting a specific minority business participation goal, TDA reports to HUD on the levels of MBE and WBE hiring under all TxCDBG contracts. To increase participation of small, minority and women owned-business, Grant Recipients may use the Texas Comptroller of Public Accounts Historically Underutilized Business (HUB) Directory. Also, in accordance with Section 3 of the Housing and Urban Development Act of 1968, successful applicants using CDBG funding for housing or other public construction are required, to the greatest extent feasible, to provide training and employment opportunities to lower-income residents and contract opportunities to businesses in the project area.

STEP 7 Rate Proposals and Document the Process

Once the deadline for submitting proposals has passed, the selection committee must rate the proposals using only the specific selection criteria identified in its RFP. This selection process must be thorough, uniform, and well documented through the rating sheets developed in Step 3.

STEP 8 Clear the Service Provider and Provide Environmental Exemption Determination

The Grant Recipient must verify the service provider's eligibility through the System for Award Management (www.SAM.gov). Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the construction contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

Also, the Exemption Determination for Activities Listed at 24 CFR 58.34 for Admin/Engineering Services (See Ch. 3, Environmental Review) must be completed and submitted to TDA.

STEP 9 Select the Service Provider

The selection committee recommends that the contract be awarded to the respondent with the highest total score (if this method is used) or that has the most qualifications in the proposal evaluation. The recommendation must meet the reasonable, responsive, and responsible tests according to federal procurement procedures:

- Reasonable - Refers to the most suitable, fit and appropriate respondent to accomplish the job in question.
- Responsible - Refers to the respondent that is able to fully perform the requirements of the contract and has the integrity and reliability that will assure good faith performance.
- Responsive - Refers to the respondent that has submitted a bid/proposal that fully conforms to the information requested in the RFP.

The local governing body has the final authority to award contracts and is encouraged to follow the committee's recommendation, but may select another respondent if the minutes of the local governing body meeting include justification for the selection. The local governing body may consider such matters as:

- The respondent's ability and willingness to comply with all applicable laws and regulations;
- The respondent's past performance records; and
- The respondent's financial and technical resources.

Grant Recipients must request TDA approval prior to awarding a professional services or administrative services contract if the Scope of Services does not reflect the TxCDBG contract Performance Statement (Exhibit A).

For all engineering services, and for administrative services where the proposed cost is not feasible, contract

Negotiation of price for engineering/architectural/surveyor services must take place after selection is completed; proposed cost may not be a selection criteria or consideration.

negotiations with the selected respondent occur during the last step of the selection process. The Grant Recipient may negotiate either a fixed-price or not to exceed cost-reimbursable type contract. Negotiations should be focused on the specific scope of services to be provided, terms and conditions of the contract, and the amount of compensation for each activity.

Note: If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering, or land surveying services, the Grant Recipient shall:

- (1) Formally end negotiations with that provider;
- (2) Select the next most highly qualified provider; and
- (3) Attempt to negotiate a contract with that provider at a fair and reasonable price.

STEP 10 Award Contract

After finalizing the contract, the Grant Recipient authorizes approval to proceed with contract execution.

The Grant Recipient must submit the *Financial Interest Report (Form A503)* to TDA within 30 days of executing the contract. This requirement applies to all professional and administrative services subcontractors as well.

5.2.2 Contract Provisions

A copy of the service provider contract or agreement must be submitted to TDA, which must include the following at a minimum:

- Names of Both Parties - Grant Recipient and firm.
- Effective Dates - Starting and ending dates.
- Scope of Services - Either directly written into the contract or provided as an attachment that is incorporated into the contract.
- Compensation - Including the maximum amount of the contract as either a firm, fixed-price contract, or a not to exceed cost-reimbursable type contract.
- Local Program Liaison - Identification of a local public official as the consultant's primary contact.
- Amendments - Procedures for amending the scope of work and/or compensation section.
- Termination - Explaining circumstances under which the Grant Recipient or other party can cancel the contract (e.g., unsatisfactory performance).
- Resolution of Program Non-compliance – Procedures for determining the party responsible for any disallowed costs as a result of non-compliance with federal, state, or program requirements.

See APPENDIX I for Sample Bid and Contract Documents for Professional Services Contracts.

Any changes to the Professional Services/Administrative contract price must be documented in the local files through a contract addendum.

5.3 Micro-Purchases

For purchases of supplies or services that are less than \$2,000, the Grant Recipient may use processes that expedite the transaction and minimize the associated administrative burden.

The purchase orders may be awarded without soliciting any competitive quotations if the Grant Recipient considers the costs to be reasonable and local laws and policies do not prohibit this method of procurement; however, the use of purchase order does not exempt the Grant Recipient from verifying that the contractor is not debarred under the System for Award Management (www.SAM.gov). The Grant Recipient is required to distribute micro-purchases equitably among qualified suppliers.

For example, a purchase of computer paper in the amount of \$1,500 can be treated as “a micro-purchase.” No competitive quotations would be necessary for the purchase and a price analysis would not be required. However, the Grant Recipient must consider whether to make the purchase from any one of a number of office supply stores. Grant recipients may require that the purchase of computer paper rotate among qualified suppliers if they offer the same rates.

TDA will monitor the use of micro-purchases to ensure that they are not being used to circumvent competitive procurement. Materials and construction should be purchased through small purchase or sealed bids procurement; micro-purchases are generally made for unanticipated costs.

5.4 Construction Services & Materials Contracts

Construction services and materials contracts paid in whole or in part with TxCDBG funds must be procured using either the **Small Purchase** procurement method or the **Sealed Bids** procurement method. Grant Recipients must comply with TxCDBG program requirements in order to be considered eligible for grant (reimbursement) or match injection.

5.4.1 Small Purchase Procurement

The Small Purchase procurement method uses relatively simple and informal procurement methods to secure equipment, non-professional/non-administrative services, supplies or other property that cost, in the aggregate, less than \$50,000 in accordance with state law.

Key concepts for Small Purchase procurement include:

- Aggregate cost – **total cost of the project/job** including TxCDBG funds and all other funding sources;
- Job – a project as defined by the engineering plans and specs;
- Separate purchases – purchases, made separately, of items that in normal purchasing practices would be purchased in one purchase;
- Sequential purchases – purchases, made over a period, of items that in normal purchasing practices would be purchased in one purchase;
- Component purchases – purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

The Local Government Code, Sec. 262.023 (c) and Sec. 252.021 specifically prohibit the use of the small purchase procurement method to make separate, sequential, or component purchases of items or services, with the intent of avoiding the competitive bidding and competitive proposal requirements. For example:

- A water line job should be one purchase, rather than separate purchases of pipe, fire hydrants, valves, and fittings.
- A water storage tank should be bid as one purchase, rather than separate purchases of site preparation, foundation, piping, valves, welding, etc.

Prior to beginning small purchase procedures, the Grant Recipient should get an estimate of the cost of the construction from the engineer. If the estimated cost is greater than \$ 50,000, small purchase procurement would not be considered appropriate and is not an allowable cost.

5.4.2 Step by Step Small Purchase Procedures

STEP 1 Comply with Davis-Bacon Act requirements

The Grant Recipient must obtain prevailing wage rates for the local area as required by the Davis-Bacon and Related Acts, and incorporate those wage rates into the procurement for construction. See **Chapter 7: Davis-Bacon Labor Standards** for specific information on the requirements of the Davis-Bacon Act.

Wage Rates are not required for construction contracts less than \$2,000.

STEP 2 Contact three vendors for quotes or estimates

The Grant Recipient must contact at least three firms by phone, in person, or in writing including email, to obtain cost estimates for the goods or services. The responses (including responses that indicate no interest or quotes provided) must be recorded on the *Small Purchase Procurement Record (Form A504)*.

STEP 3 Promote participation of MBEs and Section 3 Businesses

The Grant Recipient should actively take steps to encourage proposals from small, minority, and female-owned businesses (MBEs), as well as Section 3 business concerns.

STEP 4 Clear the Contractor

The Grant Recipient must verify the construction contractor's eligibility through the System for Award Management (www.SAM.gov). See **Chapter 7 Davis Bacon Labor Standards** for details. Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the construction contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

STEP 5 Award the Contract

The Grant Recipient must award the contract to the lowest appropriate bidder. If the contract is awarded to a bidder that does not propose the lowest price, the Grant Recipient must document the decision in compliance with Texas Local Government Code Section 252.043 (municipalities) or Section 262.027 (counties), as applicable.

STEP 6 Execute the Contract

The Grant Recipient must submit the *Small Purchase Procurement Record (Form A504)* and *Financial Interest Report (Form A503)* to TDA within 30 days of executing the contract, and submit the *Labor Standards Record (Form A706)* prior to the first Request for Payment for construction work.

5.4.3 Sealed Bid Procurement

Procurements of equipment, non-professional services, non-administrative services, materials and construction contracts whose total cost is **more than \$50,000** must formally advertise for sealed bids in a newspaper of general circulation and hold a public bid opening. Procurements by sealed bids are usually for construction and price is a major factor in awarding these contracts. As discussed, **the revised federal guidelines now require negotiations of profit as a separate element of the price for each contract and modification greater than \$50,000. (See 2 CFR 200.323)**

Sealed bids are publicly solicited and a firm, fixed-price contract (lump sum or unit price) is awarded to the responsible respondent whose bid, conforming with all the material terms/conditions of the invitation for bids, is lowest and best in price (See **Appendix J and Appendix K** for sample bid and contract documents for material and construction contracts, respectively).

5.4.4 Step by Step Sealed Bid Procedures

STEP 1 Prepare Bid Package

The Grant Recipient must prepare a bid package detailing the specific goods or services to be provided by the contractor. This package should provide sufficient technical information for potential bidders to submit a competitive bid. If a construction contract includes both a TxCDBG project and a separate project (not included in the Performance Statement (Exhibit A of the contract) or claimed as match) to be paid by the Grant Recipient or another funding source, the construction contract should clearly indicate the work and the costs associated with each project.

STEP 2 Comply with Davis-Bacon Act requirements

The Grant Recipient must obtain prevailing wage rates for the local area as required by the Davis-Bacon and Related Acts and incorporate those wage rates into the construction procurement. See **Chapter 7: Davis-Bacon Labor Standards** for specific information on these requirements.

STEP 3 Advertise for Bids

The procedure for advertising for bids is as follows:

- Publish once a week for two consecutive weeks prior to bid opening;
- Ensure that the first publication date is at least fourteen days prior to the bid opening date;
- Ensure that the two published notices are at least 7 days apart;
- Describe work or item to be purchased or state where specifications can be obtained;
- Include time and place for receiving and opening bids (count 15 calendar days, not including the print date, from the first advertisement date);
- Include name and position of local official or employee to whom bids are sent;
- Indicate whether bidder should use lump-sum or unit pricing;
- Indicate method of payment by Grant Recipient;
- Indicate type(s) of bond(s) required by the bidder;
- Indicate whether contract will be awarded within thirty or sixty days; and
- Identify TxCDBG contract number.

If an addendum to the bid package is necessary, it must be distributed to each potential bidder. The distribution of an addendum shall be verified either by statements of receipt or registered/certified mail receipts, which shall be included in the public works construction file. The addendum shall allow adequate time for consideration in bid preparation (usually at least one week). If adequate time is not available, the bid opening date must be extended and the Grant Recipient must republish the invitation for bids containing the place, time, and date for the new bid opening. Note that any change to the original bid opening date will require republication of the invitation for bids at least once in a locally published newspaper. The republished notice will include the place, time and date for the new bid opening and must be published at least seven days prior to the new bid opening date.

TDA notes that the Dodge Report, *Texas Contractor*, the Minority Business Development Center, and regional newspapers are resources for advertising bids. See **Chapter 10: Civil Rights Requirements** for further information on Minority Business Centers.

STEP 4 Promote Participation of MBEs and Section 3 Business concerns.

The Grant Recipient should actively take steps to encourage proposals from small, minority, and female-owned businesses (MBEs), as well as Section 3 business concerns.

STEP 5 Hold the Bid Opening

- Note the date and time of receipt of each bid on the bid envelope, which must be kept with the original bid even following the bid opening;
- Open and read aloud each bid;
- Record the base bid, along with any alternates, on a bid spreadsheet;
- Announce the apparent low bidder and all bidders with complete packets.

The Grant Recipient or its designee (usually the engineer) should carefully review the bids submitted and the low bidder's statement of qualifications and references. Awarding the contract on the same date as the bid opening does not generally allow sufficient time to research and review the documents and ensure that the low bidder has provided all the required forms, bonds, certifications, as well as qualifications and references.

- **Municipalities** are required by state law to award the contract to the lowest responsible bidder based on best value considerations to the municipality. The municipality may reject any and all bids. (Texas Local Government Code Section 252.043(f))

- **Counties** are required by state law to award the contract to the responsible bidder who submits the lowest and best bid or must reject all bids and publish a new notice. (Texas Local Government Code, Section 262.027(a))

Overbids

If the bids received exceed the designated budget, the Grant Recipient has the following options:

- Reject all bids and re-bid the project;
- Accept the deductive alternates in the bid packet (if applicable);
- Delete bid items before contract award, if all bidders agree in writing to changes;
- Accept the low bid and provide additional local funds.

If all bids received exceed the amount of the construction budget, **THE GRANT RECIPIENT MAY NOT NEGOTIATE THE CONTRACT PRICE SOLELY WITH THE LOW BIDDER.** To allow one bidder to negotiate the contract price is not fair to the other contractors who submit bids. **NEGOTIATION OF THE CONTRACT PRICE SOLELY WITH THE LOW BIDDER WILL RESULT IN THE DISALLOWANCE OF TxCDBG FUNDS FOR CONSTRUCTION COSTS.**

Recordkeeping for the Bid Opening

Minutes of the bid opening, along with a tabulation of the bids, must be placed in the contract file. After contract award, the opened bids must be kept on file and available for inspection by anyone desiring to see them. However, any trade secrets and/or confidential information in the proposals are subject to the restrictions of Section 252.049(b) of the Texas Local Government Code and Chapter 552 of the Texas Government Code.

STEP 6 Clear the Contractor

The Grant Recipient must verify the construction contractor's eligibility through the System for Award Management. See **Chapter 7 Davis Bacon Labor Standards** for details and www.SAM.gov. Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the construction contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

STEP 7 Award the Contract

The Grant Recipient must award the contract within the number of days indicated in the bid advertisement.

STEP 8 Execute the Contract

The Grant Recipient must submit the Bid Tabulation and the *Financial Interest Report (Form A503)* to TDA within 30 days of executing the contract, and submit the *Labor Standards Record (A706)* prior to the first Request for Payment for construction work.

Third Party Procurement Services

A Grant Recipient may choose to purchase certain goods and services through a third party, such as the Texas Association of School Boards "Buy Board" or the Houston-Galveston Area Council "HGACBuy". All procurement requirements apply to purchases through these entities; however many steps may be conducted by the third party rather than the Grant Recipient. The Grant Recipient must retain a copy in the contract files of the cooperative agreement with the third party certifying the type of procurement process used.

5.4.5 Required Contract Provisions

In addition to other Federal and State provisions required, all contracts must address, if applicable, the following provisions per 2 CFR 200 Appendix II (See Implementation Manual, Appendix_____ for contract provisions):

- Debarment and Suspension (Executive orders 12549 and 12689) – A contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions list in the System for Award Management (SAM).
- For contracts greater than \$10,000, provisions for termination by the Grant Recipient, including the manner by which termination shall be effected and the basis for settlement.
- For contracts greater than \$150,000, provisions for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
- For contracts greater than \$150,000, the Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33U.S.C. 1251-1387), as amended.
- For contracts of materials designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR 247 and greater than \$10,000 for the fiscal year, provisions for the procurement of recovered materials. (2 CFR § 200.322)

In addition to the preceding, Construction Contracts must also address the following:

- For construction contracts greater than \$2,000, compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR part 5).
- For construction contracts greater than \$2,000, compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3)
- For construction contracts greater than \$2,000, compliance with Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708), including work week requirements and safety conditions for workers.
- For construction contracts greater than \$10,000, the inclusion of the Equal Opportunity clause provided under 41 CFR 6-1.4(b).
- For construction contracts greater than or equal to \$100,000, compliance with the Byrd Anti-Lobbying Amendment (31 U.S. C. 1352)
- Where federal funding exceeds \$ 200,000 and the contract or subcontract exceeds \$100,000, include Section 3 clause. (24 CFR § 135.38 and 24 CFR § 135.3)

5.4.6 Workers’ Compensation Requirements

Texas Labor Code §406.096 requires a governmental entity that enters into a building or construction contract to obtain written certification that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project. Subcontractors must also provide the governmental entity with proof of coverage. Additionally, the governmental entity must include in bid specifications and contracts specific language and provisions found in 28 TAC §110.110(c)(7). Grant Recipients are responsible for compliance with all applicable statutory policies. The Texas Department of Insurance – Division of Workers’ Compensation regulates and enforces workers’ compensation requirements and may be contacted at 800-372-7713 for more information.

5.4.7 Bonding Information

Pursuant to Government Code Chapter 2253, for construction or facility improvement contracts or subcontracts exceeding \$100,000, the minimum bonding requirements for the Grant Recipient which includes a bid guarantee, a performance bond, and a payment bond (if applicable) are as follows:

- A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified cashier's check, U.S. Savings bond or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.
- A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

The only forms of surety acceptable as a performance bond are:

- Cashier's Check
 - Certified Check
 - United States Treasury Bond
 - Certificate of Deposit
 - Irrevocable Letter of Credit issued by a financial institution subject to the laws of Texas
 - Surety or Blanket Bond from a company chartered or authorized to do business in Texas
- A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract. Required payment bond(s) must be filed within 30 days from the date of the Notice of Award.
 - Municipalities: If the contract is in excess of \$50,000, a payment bond is required. Government Code 2253.021(a)(2)(B)
 - Counties: If the contract is in excess of \$25,000, a payment bond is required. Government Code 2253.021 (a)(2)(A)

If the Grant Recipient has adopted an existing bonding policy and requirements that differs from that described above, the Grant Recipient may submit documentation of the existing bonding policy and requirements to TDA with a written request that TDA approve in writing the allowance of utilizing the existing bonding policy and requirements.

If TDA does not determine that its interest is adequately protected and does not provide written approval to the Grant Recipient, the Grant Recipient must adhere to the bonding policy described herein above, pursuant to 2 CFR 200.325 and Government Code Chapter 2253. All Grant Recipients must ensure that they are meeting all applicable federal, state and local procurement requirements.

5.4.8 Changes to a Construction Contract

When changes to a contract are necessary due to decrease or increase in the **quantity of work to be performed or of materials, equipment or supplies to be furnished**, the Grant Recipient must submit a *Construction Change Order Form (Form A505)* to TDA. TDA must approve all change orders to ensure costs are eligible and procured according to TxCDBG requirements. TDA will provide written notification to the Grant Recipient upon review.

To request approval of a proposed Change Order, the Grant Recipient must submit:

- A *Construction Contract Change Order (Form A505)*, including required chief local elected official's signature indicating Grant Recipient concurs with the proposed changes, and any required supporting documentation.
- If a Change Order involves a decrease or an increase of \$50,000, the Grant Recipient must provide appropriate approval by the governing body in addition to *Construction Change Order (Form A505)*

Grant Recipient must have sufficient grant or local funds available to meet any increased costs.

- Changes requested that are not directly related to the construction project and/or requesting additional supplies and or activities solely due to unutilized grant funds will not be approved.
- Changes must be appropriate and required for the specific CDBG construction project.
- If a change order includes new items which are not appurtenances, the Grant Recipient must demonstrate competitive pricing. Approved costs for these items will be eligible up to the amount of the lowest quote received.

Municipalities:

- Change Orders may not increase the original contract price by more than 25% (Tex. Local Gov't Code 252.048(d)).
- Decreases in the original contract price of more than 25% require written contractor consent. (Tex. Local Gov't Code 252.048(d)).

Counties:

- The original contract may not be increased by more than 25% unless required by state or federal law, rule or regulation after the contract is made. (Tex. Local Gov't Code 262.031(b)).
- Grant Recipient must provide written justification, including citation to the appropriate source, for review.
- Decreases to the original contract of more than 18% must have the contractor's written consent. (Tex. Local Gov't Code 262.031(b)).

NOTE: Change orders for an increase of more than 25% will be rejected. Grant Recipient must rebid project in the event of an increase of 25% or more. The State of Texas considers a change in the construction contract price of greater than 25% to be non-competitive, as other potential bidders did not have the opportunity to bid on the true scope of the project during the procurement process.

TDA will not reimburse the Grant Recipient or credit the Grant Recipient's match commitment for work listed on a Change Order unless the Change Order has been submitted and approved. Requests for Payment for unapproved change orders will be held at TDA's discretion. If the Change Order is executed without TDA approval, the Grant Recipient is obligated to pay for any changes that TDA does not approve. For these reasons, TDA recommends that the Grant Recipient submit the Change Order **prior** to fully executing the Change Order.

Grant Recipients must submit all Change Orders on a contract, whether or not the work will be paid with grant or matching funds, so that TDA's TxCDBG staff has a complete record of the construction

contract. Any difference in price from the *Labor Standards Form (Form A706)* to the *Certificate of Construction Completion (Form A709)* must be accounted for by a Change Order.

Project changes reflected in a Change Order may also require an amendment or modification to the TxCDBG contract Performance Statement or Budget (Exhibit A or B to the TxCDBG contract). These items should be submitted together as described in **Chapter 11, Contract Amendments**. Prior to executing any Change Order that makes substantial changes to the project and is likely to change the activities, location, or beneficiaries as described in the Performance Statement, the Grant Recipient should contact TDA. **TDA will approve a Change Order only when the revised project agrees with the contract Performance Statement.**

5.4.9 Procurement of Recovered Materials

Pursuant to 2 CFR 200.322, grantees, subgrantees, and their contractors must comply with section 6002 of the Solid Waste Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 of the Solid Waste Disposal Act applies to states and local governments using federal funds to procure designated items that are or can be made with recovered materials, and to persons contracting with such entities with respect to work performed under such contracts. The requirements apply if the Grant Recipient purchases \$10,000 or more worth of one of the designated recovered materials identified in the EPA guidelines at 40 CFR Part 247 during the course of a fiscal year. Per 2 CFR 200.322, Grant Recipients should purchase those items that contain the highest percentage of recovered materials practicable, while adhering to competitive bidding processes. Certain construction materials, like cement and concrete including concrete products such as pipe, are included on the list of designated items. (Check 40 CFR 247 for a list of designated items.)

5.5 Non-Competitive Proposal Procurement

Non-competitive proposal procurement (often referred to as “sole source”) may be used when the award of a contract is not feasible under small purchase, sealed bid or competitive proposal procedures. This may be due to single source availability or inadequate competition, determined after solicitation of a number of sources. Non-competitive proposal procurement is most often used for emergency situations and disaster projects. As discussed, **the revised federal guidelines now require negotiations of profit as a separate element of the price for each contract where there is no price competition. (See 2 CFR 200.323.)**

TDA authorizes non-competitive proposals in accordance with federal law. However, all Grant Recipients must receive prior approval from TDA before using non-competitive proposal procurement. All requests for non-competitive procurement must be submitted in writing by the Grant Recipient.

TDA will consider the use of non-competitive proposal procurement under the following situations (See 2 CFR 200.320(f)):

- Single Source: this method allows procurement through solicitation of a proposal from only one source when the item or service is only available from a single source;
- Public urgency/emergency situations: State laws generally allow noncompetitive negotiations in such cases where the urgency for carrying out the project will not permit delays caused by competitive advertising/solicitation. Grant Recipients requesting such exemptions are those typically funded under the Disaster Relief/Urgent Need Fund;
- After solicitation of a number of sources, competition is determined inadequate. The condition of bids being over budget alone does not create a qualifying condition (inadequate competition) or justification for non-competitive procurement. Grant Recipients must first

submit evidence of all public advertisement(s)/solicitations before TDA will consider approving noncompetitive negotiation.

- The Grant Recipient must verify the contractor's eligibility through the System for Award Management (www.SAM.gov). Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the construction contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

5.6 Recordkeeping Procedures

The Grant Recipient must maintain records that are detailed enough to show the history of each procurement. At a minimum, records must demonstrate how the Grant Recipient:

- Executed price sampling for small purchases, or established [published] RFP solicitation;
- Selected the method of procurement and the type of contract to be used;
- Determined the bids or proposals to accept and the ones to reject; and
- Computed the basis for the contract cost or price.

The Grant Recipient must submit a *Financial Interest Report (Form A503)* for all businesses and other entities contracted to provide products or services in whole or in part for a TxCDBG project. This report:

- Describes the work to be performed by the business or other entity;
- Verifies that all required clearances have been completed prior to executing a contract with the business or other entity;
- Discloses the financial interest of the business or other entity;
- Provides Minority Business Enterprise information for the business owner (not required for Councils of Government and other non-business entities); and
- Identifies Section 3 business concerns and anticipated Section 3 employment opportunities.

All contracts for \$2,000 or more must be reported on the *Financial Interest Report (Form A503)*. If the contract price changes after the contract is reported, Form A503 does NOT need to be resubmitted. Financial interests below \$2,000 (Micro-purchases by definition) should be disclosed through invoices for grant/match funding – no separate disclosure required.

5.6.1 Micro-purchases

The Grant Recipient must maintain copies of all purchase orders and, if possible, show evidence of distributing purchases equitably among suppliers.

5.6.2 Competitive Proposal - Professional Services/Administration Services

The Grant Recipient must establish and maintain separate files for records relating to the procurement of a management consultant, engineer or other service provider to detail the procurement process undertaken. The files for professional services or administration services procurement should contain the following information:

- A copy of the Request for Proposals (RFP)
- A copy of the RFP public notice and documentation relating to the distribution of the RFP's (minimum of five sent) –
 - Email – printout of the sent email with header visible;
 - Fax – confirmation page showing the fax was successfully sent; and
 - Mail – return receipt for certified mail;
- A copy of the RFP cover letter sent to each interested party;

- A copy of each respondent's reply to the Grant Recipient's RFP;
- A copy of each respondent's rating worksheet (if applicable);
- A copy of the procurement summary sheet (if applicable);
- A copy of council/commissioner court action awarding the contract; and
- A copy of the executed professional services or administration contract.

5.6.3 Construction & Material Purchases

The Grant Recipient must establish and maintain separate files for records relating to the procurement of a construction contractor or materials supplier to detail the procurement process undertaken. The files for construction and material purchases procurement should contain:

- Bid Document(s) with Labor Standards Provisions included;
- Contract Document(s) with Labor Standards Provisions included;
- Actual Advertisements for Bids (either full page or with publisher's affidavits) or evidence of quotes/estimates received (for small purchase procurement);
- Bids Received (or quotes received); and
- Bid Tabulation Sheet(s) (if applicable)

5.7 Federal & State Laws Governing Procurement of Services, Supplies and Non-Real Property

The laws and regulations described in this section apply to the procurement of services, supplies or non-real property in TxCDBG-funded projects.

5.7.1 State Laws & Regulations

Note: The full text of state statutes may be found online at: <http://www.legis.state.tx.us/>.

Texas Local Government Code - Chapter 252 (Municipalities) and Chapter 262 (Counties)

Chapter 252 Municipal Grant Recipients Construction Bidding Procedures

Municipal Grant Recipients are generally required to conduct competitive sealed bid procurement for any and all contracts over \$50,000.

Municipalities are required by state law to advertise their invitation for bids in a newspaper published in the municipality at least once a week for two consecutive weeks. The date of the first publication must be before the 14th day before the date set to publicly open the bids. If no newspaper is published in the municipality, the notice must be posted at city hall for fourteen days prior to the date of the bid opening. (Texas Local Government Code Section 252.041(a)).

Chapter 262 County Grant Recipients Construction Bidding Procedures

County Grant Recipients are generally required to conduct competitive sealed bid procurement for any and all contracts over \$50,000.

Counties are required by state law to publish a notice in a newspaper of general circulation in the county at least once a week for two consecutive weeks, with the first day of publication occurring at least fourteen days before the date of the bid opening. If there is no newspaper of general circulation in the county, the notice must be posted in a prominent place in the courthouse for fourteen days prior to the date of the bid opening. (Texas Local Government Code Section 262.025(a)).

Texas Government Code -- Chapter 2253 Public Work Performance and Payment Bonds
Covers bonding requirements.

Texas Government Code, Chapter 2254. This chapter is also known as the Professional Service Procurement Act. Chapter 2254 governs the local government procurement of professional services. It prohibits the procurement of architects or an engineer based on bid price and requires government entities to first select the most highly qualified provider based on demonstrated competence and qualifications, and then attempt to negotiate with that provider a contract at a fair and reasonable price.

Texas Local Government Code, Chapter 171. This chapter requires local government officials to disclose conflicts of interest and sets forth rules that require officials to abstain where they are in a position to vote or make a decision on any matter involving a business entity or real property for which they have an interest in.

Texas Engineering Practice Act, Chapter 1001, Texas Occupations Code. This Act states that a registered professional engineer must be hired to prepare plans, specifications, and estimates for any public works activities in accordance with this Act. The engineer must directly supervise the project in order to ensure the public health, safety, and welfare; however, this Act does not apply to road maintenance or betterment work undertaken by Counties.

Procurement Standards (Uniform Grant Management Standards (UGMS) - Texas Comptroller of Public Accounts

Conflict of Interest - Nepotism and conflict of interest regulations can be found in the Texas Government Code Chapter 573 and Texas Local Government Code Chapter 171.

5.7.2 Federal Laws & Regulations

HUD Conflict of Interest regulations at 24 CFR 570.489(h) and 2 CFR 200.318(c). This regulation sets forth prohibitions against the use of CDBG funds by employees and officials for private gain.

Title 2, Code of Federal Regulations (CFR) Part 200 – 2 CFR 200.317-.326 Procurement Standards and 2 CFR 200.333-.337 Record Retention. The full text of 2 CFR 200 can be found at

<http://www.ecfr.gov/cgi-bin/text-idx?SID=30603de019691a3c1198398480c1fabb&mc=true&node=pt2.1.200&rgn=div5>

Title 40, Code of Federal Regulations (CFR) Part 247, Comprehensive Procurement Guidelines for Products Containing Recovered Materials. These guideline designates items that are or can be made with recovered materials.